In the Supreme Court of the United States

OCTOBER TERM, 1957.

No. 523.

RAYMOND A. BIGGS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

REPLY BRIEF OF PETITIONER.

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The general public interest in the problem of tax fraud investigations and the need for clarifying Constitutional procedures in regard thereto is indicated by an article appearing in the American Bar Association Journal for November 1957, Vo. 43, page 1009, in which Warren V. Ludlam, Jr. of the Mississippi Bar sets forth the problem which confronts the citizen in his relationship with the Internal Revenue Service and emphasizes the need for the meticulous examination by the courts of each case and a determination by the courts as to the Constitutional rights of the citizen in this relationship so that the citizen may be fully protected by the courts.

For the convenience of the Court a copy of the article is reprinted herein in full.

TAX FRAUD INVESTIGATIONS: A PLEA FOR CONSTITUTIONAL PROCEDURES

BY WARREN V. LUDLAM, JR., *of the Mississippi Bar (Jackson)*

[The administration of a tax system that collects billions of dollars annually is a complex and perplexing job, and our traditions require that it be done with full respect for the rights of the taxpayers. The Bureau of Internal Revenue has thousands of hard-working, competent men and women who are scrupulous in their regard for these rights. Mr. Ludlam writes not about these, but about a small number of Internal Revenue agents who, in their zeal to collect taxes, sometimes resort to practices that, if not illegal, are certainly questionable. Mr. Ludlam discusses such practices and urges both the courts and the Internal Revenue Service itself to pay scrupulous attention to the problem.]

The construction and application of the constitutional immunities from unreasonable search and seizure and self-incrimination in the comparatively new and special situations involved in rapidly increasing tax fraud prosecutions warrants a most critical appraisal. The investigative procedures utilized by the Internal Revenue Service and the ignorance of such procedures by taxpayers are the salient features of a factual background in which insidious encroachments upon these basic rights are both easy and likely. Judicial recognition of deviations, often slight in their incipiency, and adequate protection against such impairment, can be obtained only through both an adherence to the substance of those fundamental rights and a full understanding of the investigative techniques of the Internal Revenue Service by both the Bar and the judiciary.

In a number of recent criminal income tax fraud cases, the defendant-taxpayers have contended that the

Special Agents of the Internal Revenue Service obtained vital information from the taxpayers by concealment or misrepresentation; that the giving of the information was involuntary and that the information thus obtained should be suppressed or excluded from evidence. The obtaining of criminal evidence from taxpayers under investigation in such a manner is made the subject of this article[1] not because it is thought that such practices are as yet widespread among Special Agents[2] or because it is thought that the Internal Revenue Service condones such practices, but solely as a warning that such practices by the Special Agents do occur occasionally and that their status is still unsettled. Moreover, if such practices are permitted to continue and are not dealt with firmly by the Internal Revenue Service and the courts, they can lead to a nullification of the constitutional immunities, guaranteed by the Fourth and Fifth Amendments, insofar as tax evasion cases are concerned.

The Service is charged with the duties of making both civil and criminal investigations of taxpayers in the enforcement of the income tax laws.[3] Routine income tax examinations, which are civil investigations for the purpose of determining the correct income taxes, interest

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1. The author acknowledges the assistance given in the preparation of this article by Clifford C. Chittim, of the Colorado and Mississippi Bars.

2. However, there is a possibility that the occurrences of such practices by Special Agents are increasing. At a seminar on "Techniques of Handling a Fraud Case," held November 12, 1956, in New York City in connection with New York University's Fifteenth Annual Institute on Federal Taxation, a number of attorneys indicated they are now handling one or more cases involving questions of concealment or misrepresentation by the Special Agents.

3. Because of space limitations, the next seven paragraphs have not been footnoted, since the information contained therein is generally known by tax practitioners.

and certain civil penalties due, are made by persons, usually referred to as "Revenue Agents," who are attached to the Audit Division in the District Director's office. These routine income tax examinations are commonly referred to by government agents, tax practitioners (both lawyers and accountants) and taxpayers as "audits," "routine checks," "routine investigations," and "routine examinations." To the average taxpayer who has never knowingly been investigated for criminal tax evasions, each of these terms, when used by a government agent, implies that the investigation, beginning or in progress, is solely for determining the correct tax due and certainly carries no connotation of a criminal investigation. On the other hand, whenever income tax fraud is suspected or found, the criminal investigation, for the purpose of determining whether the evidence will support a criminal prosecution and working up such evidence is conducted by persons usually referred to as "Special Agents," who are attached to the Intelligence Division in the District Director's office. When fraud is suspected or found, the Intelligence Division usually assigns a Special Agent to conduct a joint investigation with a Revenue Agent, the Special Agent's principal function being to find evidence which will show whether or not the criminal tax evasion laws have been violated and to collect such evidence and the Revenue Agent's principal function being to determine the correct income tax due. The Intelligence and Audit Divisions are separate units within the District Director's office and, in the main, have different and separate duties, functions and purposes. However, this existence of two different types of investigative agents and this difference in their functions are not generally known or understood by the average taxpayer. Many taxpayers think of all agents (whether they introduce themselves as Revenue

Agents or Special Agents), as Revenue Agents, who have appeared to determine the correct income tax—not to conduct a criminal investigation. There is substantial evidence that some think that all criminal investigations, pertaining to all federal criminal laws, including the criminal statutes of the revenue laws, are conducted solely by the FBI. Rarely are any of them aware beforehand that the Special Agent is also a criminal investigator. The Special Agent does not wear a uniform, as does the city policeman; nor does the introduction of a person as a "Special Agent" convey to the average person any suggestion of a criminal investigation as is prompted by the introduction of a non-uniformed person as a "detective" or "FBI Man." This lack of knowledge or this misconception by the average taxpayer is one reason why certain subterfuges or misrepresentations, occasionally attempted by Special Agents, should be dealt with strongly by the courts under the Fourth and Fifth Amendments.

In each investigation, the Special Agent, either at the beginning or during its course, usually wants to examine the taxpayer's books and records and to obtain information from the taxpayer. The Fourth Amendment protects "the people * * * in their persons, houses, papers and effects, against unreasonable searches and seizures. * * *." The Fifth Amendment, the constitutional guarantee against compulsory self-incrimination, provides that no person "* * * shall be compelled in any criminal case to be a witness against himself. * * *." In recognition of these constitutional guarantees, the Service has for a long time had a firm policy that, until it decides against criminal prosecution, it will not issue a summons to the taxpayer for his records under the Code sections pertaining to compulsory production of records and testimony. Hence, the Special Agent either *asks* the taxpayer, frankly and fairly, for the

books and information or occasionally gets them from the taxpayer under circumstances, which to say the least are questionable, and some of which cannot be described as anything but subterfuge or misrepresentation. It is these questionable circumstances and the special issues arising from them with which we are here dealing.

The special issues may arise in some variation of either of two situations:

Situation No. 1: In the more common situation, the Revenue Agent begins an examination routine in character and so advises the taxpayer. He requests permission of the taxpayer to examine his books and records and requests of him other information in an oral or other informal manner, all of which taxpayer will probably freely give. Later, upon development of suspicion of fraud, a Special Agent enters the case. His participation may be concealed, his identity may or may not be revealed, or it may be concealed by introducing him as a fellow revenue agent. The Revenue Agent (or the Special Agent) may thereafter make further repeated assertions that this is only a "routine check." In any case, the taxpayer is not advised of the changed character of the investigation. It is not until later in the investigation, if at all (probably not until a formal questioning), that the taxpayer is warned that anything he says may be used against him.

Situation No. 2: In the second factual situation, fraud is suspected before the investigation begins, and a Special Agent, alone or jointly with a Revenue Agent, begins an investigation for the purpose of determining whether there is evidence which will support criminal prosecution. The Special Agent may or may not identify himself as a Special Agent; he explains that the returns of the taxpayer have been assigned to him for investigation, but carefully re-

frains from disclosing the criminal character of the investigation. If the Special Agent does not present himself, then he works through a Revenue Agent, who alone appears to the taxpayer and fronts for the Special Agent. Here again, in some instances, the taxpayer is advised by the Special Agent or the Revenue Agent that the examination is purely routine and civil in character, or that it is a "routine check." At some point in the investigation, a request is made of the taxpayer for the opportunity to examine his books and records and for other information, in an oral or other informal manner, from the taxpayer. Later, the Special Agent, in conversation with the taxpayer, may advise him of some discrepancies which he would like to discuss, and that he doesn't have to answer any question he doesn't want to; but, here again, this is usually not done until a formal questioning.

The Special Agent, no matter at what point he enters the investigation, knows that his sole task (at that point) is to determine whether there is evidence of income tax evasion sufficient to justify his recommendation for criminal prosecution and to assure the availability of such evidence at a trial. Only after he has decided not to recommend criminal prosecution does he determine whether the evidence warrants a recommendation for the assessment of the 50 per cent civil fraud penalties.

In either situation, the affirmative acts of concealment of the presence in the investigation of the Special Agent, or the affirmative (whether expressed or implied) misrepresentations of the Special Agent's identity or the criminal character of the investigation are done for one principal purpose—to secure records and information which he fears will not be supplied if he makes a full disclosure of his identity and purpose. Nevertheless, in the event of a prosecution, the Special Agent will probably be

permitted to testify to any oral statements or admissions secured from the taxpayer under these circumstances.

How have the courts reacted to these situations in income tax fraud prosecutions?

The courts have generally applied, in determining whether statements made by the taxpayer or information obtained from his books and records are admissible, the principle announced by the Supreme Court in *Wilson v. United States*[4] that the true test of admissibility of statements is whether they are "made freely, voluntarily and without compulsion or inducement of any sort." Sometimes the test is expressed as whether "voluntarily and understandingly given."[5] Under either definition the courts are in fairly uniform agreement that a "constitutional warning" is not a necessary prerequisite of a "voluntary" statement.

In the absence of an expressed, clear promise of immunity, the courts have developed no uniform pattern of treatment of the situations described. (a) Two have suppressed the illegally obtained evidence as a matter of law; (b) some have admitted the evidence as a matter of law, despite the Special Agent's methods; (c) some, while refusing to exclude the evidence as a matter of law, permit the circumstances under which it was secured to go to the jury for their determination of the weight and credibility to be accorded such evidence.[6]

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4. 162 U. S. 613, 623 (1896).

5. *Turner v. United States*, 222 F. 2d 926, 931 (4th Cir. 1955), *cert. den.* 350 U. S. 831 (1955).

6. Omitted from consideration under this category are cases such as *Smith v. United States*, 348 U. S. 147 (1954), in which, because of conflicting evidence, the net worth statement and the circumstances under which it was supplied to the agent were submitted to the jury under an instruction to reject the statement and all the evidence obtained through it if "trickery, fraud or deceit" were practiced on the defendant or his accountant.

To secure the full protection afforded by the "(a)" line of decisions, the taxpayer has had to bring his case within one or more of the stereotyped forms of fraud or deceit. Until the "voluntary disclosure" policy was abandoned by the Treasury Department, evidence secured through a voluntary disclosure prior to the initiation of an investigation, in reliance upon the Treasury's promise of immunity, was commonly suppressed.[7] Despite the number of recent cases in which the Special Agent's activities were questionable. *United States v. Lipshitz*[8] and *United States v. Wheeler*[9] stand as the only cases in which the evidence, not induced by an express promise of immunity, was suppressed as a matter of law. The conduct of the Special Agent, in the *Lipshitz* case, without revealing to the taxpayer his presence in the examination, in directing from his office the Revenue Agent in the accumulation of evidence far beyond the scope of the customary routine audit was characterized by the Court as not appreciably different from "stealth or subterfuge."

In the *Wheeler* case, evidence of income tax evasion, secured from an examination of the taxpayer's books and records by an Internal Revenue Agent, under the pretext of a routine examination, the real purpose of which was to determine whether the taxpayer had engaged in any criminal activities with employees of the Internal Revenue Service, was suppressed. The court held that this was fraud or deceit perpetrated on the taxpayer at the inception of the investigation and held that it rendered nugatory the taxpayer's consent to the examination.

The "(b)" line of decisions, at the other extreme, hold, as a matter of law, that in the absence of an express

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7. *In re Liebster*, 91 F. Supp. 814 (E. D. Pa. 1950).
8. 132 F. Supp. 519 (E. D. N. Y. 1955).
9. 149 F. Supp. 445 (W. D. Pa. 1957).

representation that only civil liability will be considered, the failure to disclose the criminal nature of the investigation does not render the evidence inadmissible.[10] Nor, is the rule modified by a conflict in the evidence as to whether the Special Agent disclosed his identity;[11] or by the fact that from the outset the search was for evidence of crime; [12] or by the conduct of a Revenue Agent, after completion of the routine examination, in introducing a Special Agent as a "fellow Revenue Agent" and proceeding with a criminal examination under the pretext of verifying a transaction he had overlooked.[13]

In the *Wolrich* case,[14] it is implied that the test is whether the representations made (the Revenue Agent stated that it was a "routine audit") amount to a promise of immunity. But it is submitted that the real test is whether the information was "voluntarily given"; that a promise of immunity, however, expressed or implied, is only evidence going to the "voluntary" question; and that even though an implied promise of immunity cannot be found, nevertheless there are other concealments and misrepresentations which can be made by the Special Agents, which make the giving of the information by the taxpayer "involuntary."

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10. *Blumberg v. United States*, 222 F. 2d 496 (5th Cir. 1955); *Scanlon v. United States*, 223 F. 2d 382 (1st Cir. 1955).

11. *United States v. Achilli*, 234 F. 2d 797 (7th Cir. 1956), certiorari granted on an entirely different issue, — U. S. —, 1 L. ed. 2d 595, 663; *affd.* 353 U. S. —, 1 L. ed. 2d 918 (1957).

12. *Turner v. United States*, *supra* note 5.

13. *United States v. Wolrich*, 119 F. Supp. 538 (S. D. N. Y. 1954), but compare the court's subsequent opinion on motion for reargument of motion to suppress evidence in 129 F. Supp. 528 (1955), in which the court ordered a rehearing on the question whether taxpayer's consent to the examination of his books and records was obtained by fraud by the Revenue Agent.

14. *Ibid.*

Under the "(c)" line of decisions, in variant factual situations, the courts have held that the circumstances under which records and admissions were obtained were insufficient to warrant their exclusion from evidence as involuntary, as a matter of law, but that such circumstances were matters which went to the weight or credibility of the evidence. This disposition has been made where, after the initiation of a routine examination of which the taxpayer was advised, a Special Agent entered the case to secure evidence of crime, without disclosing to the taxpayer the changed character of the investigation,[15] and without disclosing his identity.[16] Likewise, it has been utilized where the Revenue Agent and Special Agent at the outset of the examination in search of criminal evidence represent and subsequently repeat that the examination is purely civil.[17]

The "(c)" approach conceivably could work to the advantage of a skilled defense counsel, by affording to him the opportunity for full jury consideration of questionable investigative procedures which reflect upon the government's case. However, as a means of protection against invasion of constitutional rights, it has serious limitations. First, the members of the jury, not being judicially trained, are subject to the greater temptation to consider first the question of guilt rather than the weight or credibility of particular pieces of evidence, and, if the former looks bad for the defendant, then approach the weight and credibility of particular portions of the evidence with a mind already deeply impressed with defend-

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15. *Lloyd v. United States*, 226 F. 2d 9 (5th Cir., 1955).

16. *United States v. Guerrina*, 126 F. Supp. 609 (E. D. Pa. 1955).

17. *Montgomery v. United States*, 203 F. 2d 887 (5th Cir. 1953).

ant's guilt. Secondly, assuming that the jury finds that evidence was involuntarily given, there is a real peril, especially in net worth cases, that it will not be able to identify accurately the illegally secured evidence and the other information obtained as a result of it by the Special Agent.

A comparison of the *Lipshitz*,[18] *Wolrich*,[19] and *Guerrina*[20] cases demonstrates the lack of uniformity among the courts in dealing with these situations. They differ in their specific facts, but their substance is hard to distinguish; yet each court resolved the special issue in a different way. *Lipshitz* was an "(a)" decision (i.e., evidence suppressed as a matter of law); *Wolrich* was a "(b)" decision (i.e., evidence admitted as a matter of law); and *Guerrina*, originally an "(a)" decision was, on reconsideration, turned into a "(c)" decision (evidence admitted for jury to determine weight and credibility).

Thus, the cases show that Special Agents do occasionally resort to subterfuge and are employing investigational techniques, which, because of the average taxpayer's limited knowledge about Special Agents, are questionable as deceit or fraud.

A practical conclusion is that, until these questionable techniques are brought within control by either the Service itself or by the courts, in *any* revenue investigation, even before it appears that the investigation is a criminal one, the taxpayer, at the beginning, should have the advice of a tax attorney, versed in constitutional and criminal law. In too many cases today constitutional rights have unwittingly been nullified by the taxpayer and his advisers

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18. *Supra*, note 8.
19. *Supra*, note 13.
20. *Supra*, note 16.

before an attorney is consulted. Attorneys and accountants should agree on procedures that will assure better protection of these valuable rights.

It is also obvious that the Internal Revenue Service needs to reform some of its investigational techniques. To maintain its own self respect and the people's faith in our revenue system, the Service should adopt new investigational policies and techniques, which will eliminate such questions, and should fully inform the people of its procedures and its Intelligence Division.

But, until such reforms occur, it is hoped that the courts will take a closer look at these situations and these questionable investigational techniques in the light of the Fourth and Fifth Amendments.

CONCLUSION.

For the reasons indicated in the petition for writ of certiorari, and as indicated in the foregoing article, it is respectfully suggested that in the exercise of sound judicial discretion, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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